REMARKS

A total of 33 claims remain in the present application. The foregoing amendments are presented in response to the Office Action mailed March 21, 2006, wherefore reconsideration of this application is requested.

By way of the above-noted amendments, claims 2-16 and 18-33 have been amended to address the Examiner's objections at paragraph 1 of the Detailed Action. Clearly, no new subject matter has been introduced.

Referring now to the text of the Office Action:

- claims 1 and 17 stand rejected under 35 U.S.C. § 102(e) or 103(a) as being unpatentable over the teaching of United States Patent No. 6,912,232 (Duffield et al);
- claims 1 and 17 stand rejected under 35 U.S.C. § 102(e) or 103(a) as being unpatentable over the teaching of United States Patent No. 6,912,232 (Duffield et al) in view of United States Patent No. 6,708,209 (Ebata et al.);
- claims 2, 6, 8-16, 18, 22, 23, 25-33 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the teaching of United States Patent No. 6,912,232 (Duffield et al) in view of United States Patent No. 6,708,209 (Ebata et al.);
- claims 3-5 and 19-21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the teaching of United States Patent No. 6,912,232 (Duffield et al) in view of United States Patent No. 6,708,209 (Ebata et al.), and further in view of United States Patent No. 6,765,927 (Martin); and
- claims 7 and 24 are objected to as being dependent on a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

As an initial matter, applicant appreciates the Examiner's indication of allowable subject matter in claims 7 and 24. The Examiner's claim rejections under 35 U.S.C. §§ 102 and 103 are believed to be traversed in view of the following discussion.

At paragraphs 2 and 6 of the Detailed Action, the Examiner states that "claims 1 and 17 are rejected under 35 U.S.C. § 102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) and obvious over Duffield et al ...". With respect, there is a clear distinction in law between rejections under 35 U.S.C. § 102 and rejections under 35 U.S.C. § 103. These differences are not merely semantic, but materially affect the scope of arguments that may be relied upon by the Applicant in traversing any such rejections. For at least these reasons, it is incumbent on the Examiner to clearly define each rejection, and the grounds therefore. Applicant believes that rejections stated in the alternative, which create ambiguity as to whether the claims are being rejected under 35 U.S.C. § 102 or § 103 fail to meet this requirement, and are improper.

Furthermore, in paragraph 6 (on page 5, starting at line 17) of the Detailed Action, the Examiner admits that "Duffield however fails to disclose forwarding the QoS information through the VPN Tunnel to a VPN Gateway at an opposite end of the VPN Tunnel." This admission by the Examiner directly contradicts the Examiner's assertion in paragraph 1 of Detailed Action that Duffield does provide such teaching. Applicant is of the view that a reference either teaches a cited element, or it does not. It cannot do both.

With respect to possible rejections under 35 U.S.C. § 102, Applicant notes that the Examiner has admitted that Duffield fails to teach at least one claimed element. To the extent that a claimed element is not taught in a cited reference, a rejection under 35 U.S.C. § 102 cannot be sustained by that reference. Accordingly, reconsideration and withdrawal of the claim rejections under 35 U.S.C. § 102 is believed to be in order, and such action is courteously solicited.

With respect to possible rejections under 35 U.S.C. § 103, Duffield et al explicitly teach that:

> "each hose 210-216 is specified by a service level agreement (SLA) without reference to other end-points. Once agreed, the VPN guarantees performance of the hose 210-216 independent of a type or destination of communication traffic through the hose 210-216 as long as the communications traffic remain within the SLA. Thus, a customer network 202-208 (or an operator of the customer network 202-208) need not specify performance for each of the endpoints that may be a destination." [Col. 3, lines 39-48]

Clearly, since "each hose 210-216 is specified by a service level agreement (SLA) without reference to other end-points" the sending of QOS information between end-points (hoses or customer networks) is entirely redundant. As such, Duffield et al explicitly teach away from the claimed feature that QOS information is sent "through the VPN tunnel to a VPN gateway at an opposite end of the VPN Tunnel".

Applicant notes that the mere fact that a reference could perform a claimed function, is not equivalent to a teaching of that claimed function. Similarly, the fact that a reference could be modified to perform a claimed function, does not render the claimed function obvious absent any teaching or motivation for making the modification.

Clearly, Duffield et al do not provide any teaching or suggestion that QOS information is sent "through the VPN tunnel to a VPN gateway at an opposite end of the VPN Tunnel" as required by the claimed invention. Furthermore, there is no motivation to modify the system of Duffield et al. to provide such functionality, because again, this function is entirely redundant in the system of Duffield et al.

None of the other cited references provide the missing teaching. United States Patent No. 6,708,209 (Ebata et al.) teaches that policy information held by one policy server can be published to other policy servers of a network. However, Ebata et al do not attempt to apply this teaching to virtual private networks (VPNs), and do not teach or suggest using this functionality to enable dynamic QOS treatment of traffic. Note that neither VPNs nor the provision of dynamic QOS treatment of traffic are even mentioned by Ebata et al., much less taught. Thus Ebata et al fail to provide either teaching or motivation for modifying the system of Duffield et al in the manner suggested by the Examiner.

For at least the foregoing reasons, it is respectfully submitted that the presently claimed invention is clearly distinguishable over the teachings of the cited references, taken alone or in any combination. Thus it is believed that the present application is in condition for allowance, and early action in that respect is courteously solicited.

If any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this response, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an

extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 19-5113.

Respectfully submitted,

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